Supreme Court, U.S.
FILED

98 183 JUL 28 1998

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN M. REZNIK
(Counsel of Record)
JOHN M. BOWMAN
JEFFER, MANGELS, BUTLER
& MARMARO, LLP
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067
(310) 203-8080
Counsel for Petitioner.

July 28, 1998

Washington, D.C. • THIEL PRESS • (202) 328-3296

QUESTIONS PRESENTED

1. Where real property cannot be put to any economically beneficial or productive use from the time a state administrative agency makes a final decision to deny a development permit until judicial invalidation of the agency's decision, does a property owner have a constitutional right to receive just compensation for a temporary taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or does judicial review of the agency's permit denial constitute a non-compensable "normal delay" in the development process within the meaning of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)?

2. Under *First English*, does the implied exception from temporary takings liability for "normal delays" in obtaining development permits extend to judicial proceedings that conclude with a holding that an administrative agency's decision to deny a permit was not authorized by state law, or does it cease to apply once the agency charged with implementing the regulations renders a final decision on the application?

3. Did the court below err in holding that the temporary denial of all use of land caused by an agency's erroneous decision to deny a development permit constitutes "normal delay" within the meaning of *First English* as long as the agency's decision, although unlawful, attempted to advance some legitimate governmental interest?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in this Court are Landgate, Inc. ("Landgate") and the California Coastal Commission (the "Commission").

Landgate is the owner of the subject real property and was the applicant in the underlying administrative proceedings. Landgate has neither a parent company nor any subsidiaries.

The Commission is a state agency organized and existing under the laws of the State of California. Under the California Coastal Act of 1976, California *Public Resources Code* §§ 30000 et seq., the Commission has jurisdiction to approve "development" within the coastal zone, as defined by law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	2
A. Background	2
B. Proceedings Below	3
REASONS FOR GRANTING THE PETITION	8
A. The Petition Should Be Granted Because It Presents Important Questions Left Unanswered by this Court in *First English*	12
B. The Questions Presented Are Important	13

Page

1. The Test Created by the Court Below Effectively Restores the "No Compensation" Rule Rejected by this Court in *First English* 14

2. The Test Created By the Court Below Vitiates the "Categorical Takings" Rule of Lucas 16

3. The Test Created by the Court Below Invites Regulatory Abuse 17

4. The Test Created by the Court Below Unfairly Forces Property Owners to Bear the Burden of Governmental "Mistakes" in the Permitting Process 19

C. The Decision of the Court Below Is Erroneous and Conflicts with this Court's Decisions in *First English, Williamson County*, and *Lucas* 20

1. The Conflict with *First English* 21

2. The Conflict with *Williamson County* 24

3. The Conflict with *Lucas* 27

CONCLUSION 30

TABLE OF AUTHORITIES

	Page(s)
CASES	
1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575 (1992)	9
Agins v. Tiburon, 24 Cal.3d 266 (1979)	14
Agins v. Tiburon, 447 U.S. 255 (1980)	14, 23
Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996)	19
California Coastal Commission v. Buckley, 98 Daily Journal D.A.R. 7537 (July 10, 1998)	12
Chicago, Burlington & Q.R. Co. v. Chicago, 166 U.S. 226 (1897)	1
City of St. Petersburg v. Bowen, 675 So.2d 626 (Fla. App. 1996)	10
County of Imperial v. McDougal, 19 Cal.3d 505 (1977)	26
Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996)	21
Dolan v. City of Tigard, 512 U.S. 374 (1994)	21

	Page(s)
Dumont v. Town of Wolfeboro, 622 A.2d 1238 (N.H. 1993)	9
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)	i, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23
Healing v. California Coastal Commission, 22 Cal.App.4th 1158 (1994)	6, 9
Landgate, Inc. v. California Coastal Commission, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841 (1998)	1
Landgate, Inc. v. California Coastal Commission, 61 Cal.Rptr.2d 196 (1997)	1
Lechuza Villas West v. California Coastal Commission, 60 Cal.App.4th 218 (1997)	26
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	i, 11, 16, 27, 28
Lujan Home Builders v. Town of Orangetown, 568 N.Y.S.2d 850 (1991)	9
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	24, 26

	Page(s)
Macri v. King County, 126 F.3d 1125 (9th Cir. 1997)	20
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	18, 20, 29
Parks v. Watson, 716 F.2d 646 (9th Cir. 1983)	20
Patsy v. Florida Board of Regents, 457 U.S. 496 (1982)	25
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)	10
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	13
San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981)	18
Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110 (1973)	18
Smith v. Town of Wolfeboro, 615 A.2d 1252 (N.H. 1992)	9
Steel v. Cape Corporation, 677 A.2d 634 (Md. Ct. Spec. App. 1996)	10
Suitum v. Tahoe Regional Planning Agency, 117 S. Ct. 1659 (1997)	24

Page(s)

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 10, 11, 24, 25, 26

STATUTES

28 U.S.C. §1257(a) 1

42 U.S.C. 1983 21

California Public Resources Code §§30000 et seq. ii

OPINIONS BELOW

The opinion of the California Supreme Court is reported as *Landgate, Inc. v. California Coastal Commission*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841 (1998); the entire opinion appears at Appendix A to the Petition. The opinion of the California Court of Appeal upholding the trial court's decision to grant Landgate's motion for summary adjudication of its takings claim was certified for partial publication pursuant to California Rules of Court, Rules 976(b) and 976.1, and was partially published in an unofficial reporter as *Landgate, Inc. v. California Coastal Commission*, 61 Cal.Rptr.2d 196 (1997); the entire opinion appears at Appendix B to the Petition. The earlier opinion of the California Court of Appeal upholding the trial court's decision to issue a writ of mandate is unreported; the entire opinion appears at Appendix C to the Petition. The relevant orders and opinions of the trial court are unreported; they appear at Appendices D and E of the Petition.

JURISDICTION

The Supreme Court of California entered its opinion and judgment on April 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

The Fifth Amendment is made applicable to the States through the Fourteenth Amendment. *See Chicago, Burlington & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). The Fourteenth Amendment provides in pertinent part: "nor shall

any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Background

Landgate owns a 2.5-acre vacant lot in the Malibu hills zoned for residential use. Although the lot is not visible from the coastline, it is located within the "coastal zone" as delineated by the Commission. App. 3a.

The subject lot was created by Landgate's predecessor-in-interest and approved by the County of Los Angeles in 1989 through a procedure known as a "lot line adjustment." The purpose of the lot line adjustment was to accommodate the County's plan to construct an east-west roadway bisecting two adjoining lots owned by Landgate's predecessor-in-interest. Under the approved lot line adjustment, the former lots, which ran in a north-south direction, were reconfigured into two new lots running in an east-west direction (one lot on each side of the new roadway). App. 3a.

Landgate purchased the newly-created northern lot in 1990. After posting a $52,000 street bond, Landgate applied for and received County approval of grading and building plans to construct a single-family home on the property. App. 3a.

In October 1990, Landgate filed an application with the Commission for a coastal development permit for the proposed residence.[1/] In February 1991, the Commission denied

---

[1/] Because the Commission had not yet certified the County's "local coastal program," a coastal development permit was required from the (continued...)

Landgate's application on the ground that, among other things, the lot itself was not "legal" because the lot line adjustment previously approved by the County had not been approved by the Commission and therefore constituted impermissible "development" under the Coastal Act. Landgate's request for reconsideration, which proposed reductions in the height of the structure and the amount of grading, was denied by the Commission during its April 11, 1991 meeting.[2/] App. 8a.

Thus, the Commission, in an attempt to expand its jurisdictional reach, refused to issue a development permit to Landgate. The Commission's decision to deny the application constituted a final decision by the Commission regarding the extent of development it would allow on Landgate's lot -- none.

B. Proceedings Below

In March 1991, Landgate filed a lawsuit against the Commission, seeking a writ of mandate to set aside the Commission's final decision to deny the development permit. The complaint also sought damages for the temporary taking of Landgate's property without just compensation. App. 7a.

In October 1991, the trial court issued a writ of mandate overturning the Commission's denial of Landgate's application

---

[1/](...continued)
Commission for the proposed construction.

[2/] During the meeting, the Commission's Chief Counsel advised the Commission that "without the lot line adjustment some of these revisions are I think irrelevant." Additionally, the Commission's Executive Director told the members that "without your willingness to change the lot line, [the proposed changes] wouldn't have led to a different result ...." App. 63a.

and ordering the Commission to reconsider the application without regard to the lot line adjustment (i.e., to consider Landgate's property to be a legal lot). The trial court determined that the term "development" as defined by state law "does not include the lot line adjustment approved and recorded by the County ...." App. 104a.

In December 1992, the California Court of Appeal affirmed the trial court's decision to issue the writ. App. 99a. The court noted that the Commission retained "its ability to regulate and approve any proposed *building* on the lot." App. 98a (emphasis added).

On February 16, 1993 -- nearly two years after the Commission rendered its final decision to deny Landgate's application -- the Commission, in response to the trial court's writ of mandate, conditionally approved a coastal development permit to construct a residence on Landgate's lot. App. 64a. Landgate, having expended its construction funds on litigation, was unable to construct the proposed residence.

Landgate then sought summary adjudication on its remaining temporary takings claim, arguing that the Commission's illegal denial of a development permit prevented it from making any economically viable use of its property. The Commission also moved for summary judgment, contending that its "jurisdictional error" did not constitute a taking of Landgate's property. The trial court granted Landgate's motion for summary judgment and denied the Commission's motion, ruling that the Commission had temporarily taken Landgate's property from February 1991 to February 1993. In its statement of decision, the trial court ruled that Landgate's regulatory takings claim was meritorious as a matter of law "because Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property insofar as

Landgate, at least temporarily, could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions." [2] App. 101a.

The trial court's ruling that the Commission was liable for the temporary taking of Landgate's property was affirmed by the California Court of Appeal in a partially published opinion. App. 90a. In so ruling, the appellate court relied on *Lucas, supra*, which held that a restriction that denies all use of property constitutes a regulatory taking of property without regard to the public interest advanced in support of the restriction. Observing that "the Commission does not argue that a viable use of the land remained after the permit denial," the court simply applied *Lucas* and concluded that the Commission's decision worked a categorical taking of Landgate's property for a two-year period. App. 69a. In response to the Commission's argument that it should not be held liable for its "mistake," the court added:

> Nothing in the record suggests that the lot line adjustment issue arose out of anything other than the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel. Instead, the overwhelming sense of the record is that by its insistence that the lot itself was illegal, the Commission put Landgate in a situation which was not of Landgate's own making and which Landgate could do nothing to cure. In short, this was not a case of bureaucratic bungling, but a declaration of war between governmental behemoths in which the inevitable

---

[2] After a bench trial on the issue of damages, the trial court subsequently ordered the Commission to pay temporary takings damages of $155,657 to Landgate. App. 10a.

casualty was to be a noncombatant, Landgate.[4] App. 71a-72a.

The California Supreme Court granted the Commission's petition for review of the case "to address the important question of whether the Commission's mistaken assertion of jurisdiction of the lot line adjustment in this case led to a temporary taking of Landgate's property."[5] App. 11a. Focusing on the above-quoted language from the Court of Appeal's decision, the court below, in a 4-3 decision, disagreed with the characterization of the Commission's action as the product of a "jurisdictional spat" between two agencies, and concluded that the Commission's denial of Landgate's permit application, while erroneous, advanced legitimate governmental interests.[6] For this reason, the court concluded that the two-

---

[4] Landgate was apparently not the first "casualty" in the "war" between the Commission and the County. In *Healing v. California Coastal Commission*, 22 Cal.App.4th 1158, 1167-68 (1994), the Commission took the position that Healing's regulatory takings claim was not "ripe" because the Commission could not say one way or the other whether Healing's house "could affect" the County's ability to obtain certification of its local coastal program -- something the County had been trying to do since 1982. In rejecting this argument, the court observed that "[t]o state the Coastal Commission's position is to demonstrate its absurdity." *Id.* at 1168.

[5] In its petition for review, the Commission did not seek review of the trial court's or the Court of Appeal's determination that the permit denial deprived Landgate of all use of its property. Consequently, under California Rules of Court, Rule 28(e)(2), this ruling was not before the California Supreme Court.

[6] A careful reading of the Court of Appeal's decision reveals that its holding was based upon the undisputed fact that the Commission's final decision on the permit application deprived Landgate of all use of its

(continued...)

year delay suffered by Landgate in the development process constitutes "normal delay" in the development process and therefore was not a temporary taking of property under the Fifth Amendment. App. 32a. The court went on to conclude that the Commission's action was "at most conditional" and held:

> Nothing in *First English* ... is inconsistent with the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking. App. 32a-33a. (emphasis in original).

Accordingly, a sharply-divided California Supreme Court reversed and remanded with directions to grant the Commission's motion for summary judgment and to deny Landgate's motion for summary adjudication.

In a dissenting opinion joined by Justice Baxter, Justice Chin sharply criticized the majority opinion below on a number of grounds. Most notably, Justice Chin pointed out that Justice Stevens, in his dissent in *First English,* "articulated the precise argument on which the majority relies here ... that litigation over the validity of a land-use restriction is simply a 'normal delay' in the permit approval process and, therefore, cannot give rise to a temporary taking." App. 38a. Justice Chin observed that while the majority opinion in *First English* "considered Justice

---

[2]/(...continued)
property for a two-year period, rather than the Commission's motives or "bad faith." Thus, by extensively discussing this secondary aspect of the case, the California Supreme Court was jousting with a straw man.

Stevens' argument *and rejected it*," it has "found new life in the majority opinion here." App. 38a (emphasis in original). Justice Chin concluded that when a regulatory agency prohibits all use of a particular property, forcing the property owner to sue the agency to get it to change its position, "its stonewalling is not fairly characterized as a 'normal delay' in the permit approval process." App. 37a.

Justice Brown wrote a second dissenting opinion, also joined by Justice Baxter, which even more vehemently criticized the majority. Justice Brown argued that the essential meaning of both *First English* and *Lucas* is that a final decision by a regulatory agency that denies all economically beneficial use of the property, even temporarily, is a per se compensable Fifth Amendment taking. Justice Brown emphasized that *Lucas* establishes a categorical rule making all regulation that denies all economically beneficial or productive use of land compensable without case-specific inquiry into the public interest advanced in support of the restraint. Consequently, Justice Brown concluded that if "a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, ... then, in California, at least for now, *Lucas* is a dead letter." App. 53a.

REASONS FOR GRANTING THE PETITION

This Petition should be granted in order to address the important questions left unanswered in *First English* and to clarify the application of the "categorical takings" rule of *Lucas* in the context of a temporary regulatory taking. In particular, state and lower courts need guidance as to whether this Court's apparent exclusion of "normal delay" in obtaining development permits from takings liability extends to litigation brought by a landowner to set aside an agency's final and erroneous decision resulting in a denial of all use. Further, in light of the new test

announced by the court below, direction is urgently needed as to whether the "substantial advancement" test applies in a case where, as here, the government agency's legally erroneous decision to deny a development permit deprived the owner of all use of its property.[7]

---

[7] These questions have divided the lower courts. Examples of cases in which the courts have treated litigation as "normal delay" or have required takings claimants to establish that permit denial did not substantially advance legitimate interests notwithstanding the denial of all use include *1902 Atlantic Ltd. v. United States*, 26 Cl. Ct. 575 (1992) (court held that the temporary harms suffered by plaintiff during the period its permit was denied were significant but cannot be charged to the government); *Lujan Home Builders v. Town of Orangetown*, 568 N.Y.S.2d 850 (1991) (court held that "as long as a land use decision-making process passes constitutional muster in the procedural sense and a full judicial mechanism exists to challenge the administrative determination, no cause of action exists for deprivation of use of the property for the period of time the property could not be used as requested by reason of administrative denial or relief"); *Smith v. Town of Wolfeboro*, 615 A.2d 1252 (N.H. 1992) (court held that decrease in value of property during the governmental decision-making process must be borne out by the property owner and does not give rise to a compensable taking, stating that "[t]he delay inherent in the statutory process of obtaining subdivision approval, including appeals to the superior court and to this court, is one of the incidents of ownership"); and *Dumont v. Town of Wolfeboro*, 622 A.2d 1238 (N.H. 1993) (court held that "[a]lthough the board's mistaken decision impeded the plaintiff's conversion of his property," the loss was part of the governmental decision-making process and was therefore not compensable as a taking). Examples of cases in which the courts have rejected the "normal delay" defense and/or properly found that a categorical taking occurred without regard to the governmental interests advanced include *Healing v. California Coastal Commission*, 22 Cal.App.4th 1158, 1171 n.7 (1994) (court "summarily" rejected the Coastal Commission's contention that the delay suffered by plaintiff is

(continued...)

This Petition should also be granted because the new *Landgate* test conflicts with this Court's decisions in *Lucas*, *First English*, and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). First, the rule established below emasculates *Lucas*, rendering it inapplicable in all but the rarest of cases. As Justice Brown observed in her dissenting opinion below, the majority decision improperly attempts to supplant *Lucas'* categorical rule with the "squishy, 'multi-factor' test" of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), "a standard so amorphous it is capable of producing virtually any result." App. 44a. Second, the *Landgate* decision ignores *First English*'s admonition that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which a taking was effective." 482 U.S. at 321. In effect, the *Landgate* decision restores the pre-*First English* rule in California that "compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect." *Id.* at 309. Third, the California Supreme Court's holding that Landgate did not have a viable takings claim (notwithstanding

---

2/(...continued)
"normal" and held that the Commission "may be liable for a regulatory taking even if it ultimately issues a permit" to plaintiff); *City of St. Petersburg v. Bowen*, 675 So.2d 626 (Fla. App. 1996) (court held that the invalidation of an ordinance "that effectively deprives the owner of all economically viable use of that property" signifies that a taking has occurred); and *Steel v. Cape Corporation*, 677 A.2d 634 (Md. Ct. Spec. App. 1996) (court held that "when an owner has been called upon to sacrifice all economically beneficial uses in the name of the common good," this constitutes a compensable taking).

the total denial of all use of its property) because the litigation it was forced to pursue against the Commission concerned "pre-conditions" of development is plainly inconsistent with the principles discussed in *Williamson County* regarding the "finality" of administrative decisions.

The questions presented are important because the answers provided by the court below represent a fundamental shift in the balance between the "freedom and flexibility of land-use planners and governing bodies" (*First English, supra*, 482 U.S. at 321), on the one hand, and the constitutional rights of property owners, on the other. Specifically, if a deprivation of all use of property resulting from a government agency's erroneous decision (and the associated litigation to set aside the decision) is not a regulatory taking because it falls within the implied exception for "normal delays" in obtaining development permits, the "exception" will swallow the "categorical rule" that "total regulatory takings must be compensated." *Lucas, supra*, 505 U.S. at 1004.

The importance of the questions presented in this Petition is underscored by the attention that this case has attracted from a wide spectrum of organizations and public agencies throughout California and the nation.[8/] Not surprisingly, this

---

[8/] Organizations and agencies filing amicus briefs with the California Supreme Court include the California Chamber of Commerce; the California Building Industry Association; the California Cattlemen's Association; the California Forestry Association; the California Mining Association; the Building Industry Legal Defense Foundation; Home Builders Association of Northern California; Pacific Legal Foundation; the Coastal Protection, Planning and Conservation League; National Audubon Society; Natural Resources Defense Council; National Wildlife Federation; Sierra Club; and the City and County of San Francisco (joined by over 70 other California cities and counties).

case has been closely watched by governmental agencies throughout California, which apparently view the California Supreme Court's decision as providing a safe harbor from the Fifth Amendment's Takings Clause.

The impacts of *Landgate* on other pending regulatory takings cases in California are already being seen. *See California Coastal Commission v. Buckley*, 98 Daily Journal D.A.R. 7537 (July 10, 1998) (case transferred by the California Supreme Court to the California Court of Appeal with directions to vacate its decision and to reconsider the cause in light of *Landgate*). This Petition should be granted in order to send a message that reports about the untimely deaths of *First English* and *Lucas* in California have been greatly exaggerated.

A. The Petition Should Be Granted Because it Presents Important Questions Left Unanswered by this Court in *First English*

In *First English*, this Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321. In so ruling, this Court expressly left unanswered "the quite different questions that would arise in the case of *normal delays* in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.* (emphasis added).

In his dissenting opinion in *First English*, Justice Stevens rhetorically asked "[w]hether delays associated with a judicial proceeding that terminates with a holding that a regulation was not authorized by state law would be a 'normal delay' or a temporary taking ...." *Id.* at 334, n.10. The majority opinion

did not answer this question, and did not attempt to define the phrase "normal delays."

In *Landgate*, the California Supreme Court adopted the reasoning of Justice Stevens' dissent and held that judicial proceedings culminating with a holding that the Commission's action was not authorized by state law amounted to a "normal delay" within the meaning of *First English* and, therefore, do not constitute a regulatory taking. App. 32a-33a. Thus, the questions left unanswered by the majority in *First English*, and the very question posed by Justice Stevens in his dissent, are now squarely presented for review.

While the majority opinion in *First English* implied that "normal delays" in the development process would not constitute a temporary taking, this Court has yet to provide guidance as to the meaning of this term. Consequently, in an effort to circumvent the "just compensation" requirement for temporary takings, government agencies are increasingly invoking the "normal delay" defense when their actions are challenged as an excessive interference with private property. Indeed, the *Landgate* decision points the way -- raising serious questions regarding the continued efficacy of the principles announced by this Court in *First English* and *Lucas*.

B. The Questions Presented Are Important

It is established doctrine that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). It is equally well established that mere invalidation of the regulation, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English*, *supra*, 482 U.S. at 319. Instead, under the "self-executing"

provisions of the Fifth Amendment, a government agency is compelled to pay compensation for such "temporary takings." *Id.* at 305.

The questions presented in this Petition are important because the test articulated by the court below for determining whether a "temporary taking" has occurred severely undermines the rule in *First English*, leaving property owners without a Constitutionally adequate remedy for excessive governmental inference with private property rights. The new test also vitiates the "categorical takings" rule of *Lucas*, requiring courts to consider whether an agency's action, albeit erroneous and confiscatory in effect, advances some legitimate governmental interest.

1. The Test Created by the Court Below Effectively Restores the "No Compensation" Rule Rejected by this Court in *First English*

Nearly 20 years ago, the California Supreme Court held in *Agins v. Tiburon*, 24 Cal.3d 266, 273 (1979), that a property owner is not entitled to compensation for the "regulatory" taking of his land unless and until the challenged regulation or decision has been held unconstitutional in an action for declaratory relief or a mandamus proceeding and the government agency has nevertheless decided to continue the regulation in effect. Under this rule, owners whose property was subjected to excessive regulations were generally limited to the remedy of invalidation of the offending regulation or decision. Although the California Supreme Court's decision was upheld on other grounds, this Court declined at that time to reach the question of whether a state may constitutionally limit the remedy for a taking to non-monetary relief. *Agins v. Tiburon*, 447 U.S. 255, 263 (1980).

Seven years later, this Court addressed the question left unanswered in *Agins*, i.e., whether government must pay compensation to a landowner whose property has been taken temporarily by the application of government regulations. In *First English*, a landowner sought compensation for the regulatory taking of its property based upon an allegation that a Los Angeles County interim flood protection ordinance deprived the owner of all use of its property. The California Court of Appeal upheld the trial court's dismissal of this claim, ruling that an owner whose property has been taken by a land-use regulation may not recover damages for the time period prior to the ultimate invalidation of the challenged regulation (i.e. during litigation). This Court disagreed, and concluded "that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period." 482 U.S. at 307.

In *First English*, this Court also implied (but did not rule) that "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" would not be compensable. Furthermore, this Court did not address (but impliedly rejected) the point raised by Justice Stevens in his dissent that "[l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan." *Id.* at 334-35. In other words, while clearly rejecting the *Agins'* "no compensation" rule for temporary regulatory takings, the door was left slightly ajar with respect to the "normal" time period for obtaining development permits.

Taking advantage of the ambiguities in the *First English* decision, the court below has established a new rule that, if left to stand, will all but eliminate the possibility of obtaining compensation for temporary regulatory takings in California. In

Landgate, the California Supreme Court held, by a bare majority (4-3), that litigation to set aside an erroneous (but not "objectively unreasonable") decision by a governmental agency concerning "pre-conditions" of development constitutes "normal delay" in the development process and is therefore not compensable, even where the erroneous decision denies all use of the property. App. 25a-33a. Specifically, notwithstanding the fact that the Commission's wrongful denial of the proposed residence on Landgate's property resulted in the total denial of all use of the property for a two-year period, the court below, taking refuge in the "normal delay" language of *First English*, left Landgate with the sole remedy of invalidation of the Commission's illegal decision. In effect, this ruling resurrects the *Agins* "no compensation" rule in California.

2. The Test Created By the Court Below Vitiates the "Categorical Takings" Rule of Lucas

In *Lucas, supra,* this Court held that governmental regulations that deny a property owner all economically viable use of his or her land constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint.[9] 505 U.S. at 1016. Here, there is no dispute that the Commission's decision was erroneous as a matter of law and that it deprived Landgate all use of its property for a two-year period while the validity of the decision

---

[9] The Court described the reason for this rule as follows: "[T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018.

was being contested in court. Pursuant to the "categorical takings" rule of *Lucas*, a temporary regulatory taking has clearly occurred and compensation is required.

The court below sidesteps this seemingly inescapable conclusion by creating a new and potentially massive loophole which will enable government agencies to escape the duty of paying just compensation even when their erroneous decisions result in the temporary denial of all use of private property. Specifically, according to the *Landgate* majority, so long as an agency's decision to deny a development permit can be characterized as being based upon a "pre-condition" of development and was not motivated by a "bad faith" intent to deprive the owner of his property, the legality of the agency's decision or its impact on the owner's ability to use the property is completely irrelevant to the takings inquiry. In other words, under the new *Landgate* test devised by the court below, government agencies can render illegal decisions on development permit applications resulting in the deprivation of all use of the property with impunity.

3. The Test Created by the Court Below Invites Regulatory Abuse

The potential for regulatory abuse is manifest. Under the new *Landgate* test, a government agency can repeatedly deny development permit applications on illegal, improper, or pretextual grounds, without having to be concerned about paying compensation for the temporary taking. In fact, an agency could keep a property owner in perpetual motion by forcing the owner to repeatedly file legal challenges to successive decisions by the agency. If the first decision is struck down, all the agency need do is render a new, and perhaps equally erroneous decision. As the litigation treadmill spins, the

property remains vacant and unusable for any beneficial purpose.[10/]

As this Court observed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 841 (1987), compliance with the Fifth Amendment's Property Clause "is more than an exercise in cleverness and imagination." The Petition should be granted to ensure that the California Supreme Court's imaginative reading of *First English* does not vitiate the categorical rule of *Lucas*.

[10/] In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981), Justice Brennan (writing a nominal dissent that had the substantive concurrence of five justices) made a similar observation in an analogous context:

> Invalidation [unaccompanied by payment of damages] hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice: 'IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN. [¶] If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110 (1973), appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. [¶] See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.' Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-93 (1975).

4. The Test Created by the Court Below Unfairly Forces Property Owners to Bear the Burden of Governmental "Mistakes" in the Permitting Process

"It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English*, 482 U.S. at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Here, the California Supreme Court has turned this principle on its head by requiring Landgate alone to bear the burden of the Commission's so-called "mistake." Since the Commission maintains that it was acting at all times in the public interest, fairness and justice dictate that this burden should be borne by the public as a whole.[11/]

Finally, it should be noted that, at least in the Ninth Circuit, a property owner may no longer pursue a claim for compensation under the "substantive" aspects of the Fourteenth Amendment's due process clause for excessive governmental interference with property rights. *Armendariz v. Penman*, 75

[11/] In *Landgate*, the majority suggests that the takings question should not turn on whether or not the agency prevails in the litigation because the "resolution of these cases often turns on the construction and application of complex statutory schemes and results in significant delays in the development process." App. 33a. In other words, the court seems to suggest that mistakes by government agencies (and the resulting litigation to correct these mistakes) are inevitable due to the increasing complexity of land use regulations, and that the public should not be held responsible for the consequences of these mistakes. Of course, this argument overlooks the fact that it is the public, through its representatives, that has created these "complex regulatory schemes" in the first place, presumably for the benefit of the public as a whole.

F.3d 1311, 1325-1326 (9th Cir. 1996) ("The scope of substantive due process does not extend to areas addressed by other, more specific provisions of the Constitution"); *Macri v. King County*, 126 F.3d 1125, 1128 (9th Cir. 1997) (dismissing plaintiff's substantive due process claim in light of *Armendariz*). Thus, as Justice Brown pointed out in her dissenting opinion below, the Fifth Amendment stands as the "last lonely bulwark" against regulatory abuse in the land development process -- making the questions presented more important than ever.

C. The Decision of the Court Below Is Erroneous and Conflicts with this Court's Decisions in *First English*, *Williamson County*, and *Lucas*

The California courts have a history of misconstruing or ignoring the dictates of the Fifth Amendment. *See First English, supra*, 482 U.S. at 311 ("[T]he California courts have decided the compensation questions inconsistently with the requirements of the Fifth Amendment"); *Nollan v. California Coastal Commission, supra*, 483 U.S. at 839 ("[O]ur conclusion on this point is consistent with the approach taken by every other court that has considered this question, with the exception of the California state courts"); *Parks v. Watson*, 716 F.2d 646, 652-53 (9th Cir. 1983) (characterizing California as representing the "extreme" end of regulatory takings jurisprudence). *See also* Coyle, *Property Rights and the Constitution* (State University of New York 1993), p. 11 (California is "a near unanimous choice [among legal land use scholars] as the state least likely to protect landowner rights"). In fact, of the twenty land use and regulatory takings decisions

rendered by this Court over the last 20 years, over one-half involved cases from California. Clearly, the California courts march to a different beat. *Landgate* is the latest case in point.[12/]

1. The Conflict with *First English*

The decision below conflicts with *First English* because it is based on, and adopts the reasoning of, the dissenting opinion in that case. Justice Chin made this point succinctly in his dissenting opinion below:

> In his dissent in *First English*, Justice Stevens articulated the precise argument on which the majority relies here. Specifically, Justice Stevens asserted, as does the majority here, that litigation over the validity of a land-use restriction is simply a "normal delay" in the permit approval process and therefore cannot give rise

---

[12/] On March 30, 1998, the Court granted review of a Ninth Circuit regulatory takings case from California, *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996). In *Del Monte Dunes*, the City of Monterey repeatedly refused to grant development permits to the owner of a 37.6-acre ocean front parcel, in spite of the fact that the owner had complied with all of the city's development conditions. Although these facts are somewhat similar to those in *Landgate*, each case presents entirely different legal questions for the Court's review. Specifically, *Del Monte Dunes* concerns the following: (1) whether liability under 42 U.S.C. 1983 is a question of law or fact; (2) whether a jury or court may "reweigh evidence concerning [the] reasonableness" of the government's decision not to approve a land use; and (3) whether the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) can be applied to an inverse condemnation claim that is based upon a regulatory denial. *Landgate*, on the other hand, presents a question of first impression regarding a government agency's liability for temporary takings during the pendency of litigation to set aside its erroneous decision.

> to a temporary taking. Justice Stevens stated: "The Court's analysis ... appears to erect an artificial distinction between 'normal delays' and the delays involved in obtaining a court declaration that the regulation constitutes a taking. [¶] *In my opinion, ... [l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan."* Thus, Justice Stevens would have held that litigation over the validity of a land-use regulation, like other "normal delays" in the permit approval process, cannot give rise to a temporary taking even if the regulation deprives the property owner of all use of its property. The majority of the high court considered Justice Steven's argument *and rejected it*. Now, the same argument has found new life in the majority opinion here. App. 38a (citations omitted).

The holding of the court below that *litigation* to set aside an erroneous agency decision constitutes "normal delay" in obtaining a development permit cannot be reconciled with *First English*. Read in proper context, it is clear that the "normal delay" language in *First English* was intended to exclude from the compensation requirement, at most, the delays associated with the *administrative proceedings* before the governmental agency. Specifically, the phrase "normal delay" was qualified by this Court as follows:

> We ... do not deal with the quite different questions that would arise in the case of normal delays *in obtaining building permits, changes in zoning ordinances, variances, and the like* which are not before us. 482 U.S. at 329 (emphasis added).

The reference to building permits, zone changes, and variances indicates that this Court was referring to the administrative or legislative process leading up to a final decision by the governmental agency to approve or deny a development permit -- not subsequent judicial proceedings made necessary by the agency's erroneous determinations. In fact, it appears that Justice Stevens assumed that this was the majority's intent when he stated that "[l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan." *Id.* at 334-35.

In support of its holding, the court below relied on *Agins* for the proposition that litigation is simply part of the "governmental decisionmaking process," and that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.'" App. 19a (quoting *Agins*, *supra*, 447 U.S. at 263, n.9). This reliance is misplaced. In *First English*, this Court rejected this notion, holding that *Agins* "merely stand[s] for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and that ... preliminary activity did not work a taking." 482 U.S. at 320.

Here, the Commission's decision cannot be fairly characterized as "preliminary activity." As Justice Chin pointed out in his dissenting opinion below, "the Commission flatly denied the permit, and its decision was final in every sense." App. 38a.

In summary, the court below misconstrued the reference to "normal delays" in *First English* and improperly extended it to include litigation. This conclusion is inconsistent with *First English* because it leaves Landgate without a sufficient remedy

for the two-year period of time in which it was deprived all use of its property. The Commission's decision worked a taking of Landgate's property for a two-year period, and no subsequent action by the Commission (whether in response to the court's writ of mandate or otherwise) can relieve the Commission of its duty to pay just compensation for this period.

2. The Conflict with *Williamson County*

In *Williamson County*, this Court held that a regulatory takings claim "is not ripe until the *government entity* charged with implementing the regulations has reached a final decision regarding application of the regulations to the property at issue." 473 U.S. at 186 (emphasis added). *See also Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1665 (1997) (a "final and authoritative decision from the *agency*" is "sufficient to satisfy the [final decision] prong of *Williamson County*") (emphasis added). In *Williamson County*, this Court explained that one of the reasons for this rule is that the factors relevant to the takings inquiry "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. Thus, under *Williamson County*, the "final decision" prong of the ripeness test is satisfied once the government agency -- not the courts -- makes a final determination regarding how it will apply the challenged regulations. *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) (observing that the question of whether a land use regulation went "too far" depends, "in significant part, upon an analysis of the effect [of] *the Commission's* application of the zoning ordinance and subdivision regulations") (quoting *Williamson County*, *supra*, 473 U.S. at 199-200) (emphasis added).

The court below ignored this principle when it held that the Commission's decision was "at most conditional," and that the litigation brought by Landgate to set aside the Commission's illegal action was simply part of the "normal delays" associated with obtaining development permits. In effect, the court held that there could be no taking until after the courts (as opposed to the Commission) had determined how to apply the regulations at issue. This holding confuses the "ripeness" requirements of *Williamson County* with the doctrine of exhaustion of remedies. As this Court explained in *Williamson County*:

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative *and judicial procedures* by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* at 193 (emphasis added).

This Court further explained that, while the state may provide "procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by [government] authorities," such a property owner "would not be required to resort to those procedures" in order to ripen a takings claim because these procedures are "clearly remedial." *Id.* (quoting *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)).

The Commission -- the "government entity charged with implementing the regulations" at issue in this case -- reached a final, definitive decision regarding how it would apply the

regulations to Landgate's lot in February 1991.[13] Thus, Landgate's takings claim became ripe the instant the Commission rendered its decision. Under *Williamson County*, the fact that Landgate had a judicial remedy in the form of a petition for writ of mandate does not immunize the Commission from takings liability.[14]

In *MacDonald, Sommer & Frates, supra*, 477 U.S. at 351, n.7, this Court expressly stated that "a property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures" in order to obtain a determination of the extent of use that will be allowed. The majority opinion below requires Landgate to do just that -- continually litigate to determine the extent of allowable development on its lot.

---

[13] It should be emphasized that the Commission's decision to deny Landgate's application was based in large part on its erroneous conclusion that Landgate's lot did not legally exist. Thus, unless Landgate acquiesced in the Commission's illegal assertion of jurisdiction of the lot line issue -- thereby waiving its right to seek judicial review of the decision under *County of Imperial v. McDougal*, 19 Cal.3d 505 (1977) -- the Commission's decision left open no other means of developing the property.

[14] This is not the first time the California courts have confused the *Williamson County* "final decision" requirement with the exhaustion doctrine. In the recent case of *Lechuza Villas West v. California Coastal Commission*, 60 Cal.App.4th 218, 234-235 (1997), the court concluded that the plaintiff's takings claim was not "final" within the meaning of *Williamson County* (and therefore not ripe) because the plaintiff had not yet "established" that it had a right to develop its property under state law in separate litigation concluded before it asserted its takings claim. The California Supreme Court denied review of this decision on April 1, 1998. A petition for writ of certiorari was filed with this Court on June 30, 1998 (case no. 98-30).

3. The Conflict with *Lucas*

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court addressed the question of whether South Carolina's 1988 Beachfront Management Act, which had the effect of barring plaintiff from erecting any permanent habitable structures on his two beachfront parcels, worked a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of just compensation. After observing that this Court has generally eschewed any "set formula" for determining whether a regulation has "gone too far," this Court described two discrete categories of regulatory action that are "compensable without case-specific inquiry into the public interest advanced in support of the restraint," as follows:

> The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property ... The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable uses of his land.*" 505 U.S. at 1015-16 (quoting *Agins, supra*, 447 U.S. at 260) (citations omitted).

The decision below is in direct conflict with this "categorical" rule. There is no dispute that the Commission's erroneous decision denied "all economically beneficial or productive use" of Landgate's property for a two-year period. Thus, under *Lucas*, inquiry into the public interest advanced in support of the Commission's decision is unnecessary and improper. Yet, that is exactly what the court has done below -- through the back door.

In *Landgate*, the court below fashioned a new and unsupported "exception" to the categorical rule in *Lucas*. In effect, the court held that litigation to set aside an agency's decision to deny a development permit will be considered "normal delay" if the decision, albeit erroneous, substantially advances a legitimate interest. App. 32a. In other words, the court took the "normal delay" language from *First English*, and then grafted the "substantial advancement" test onto the question of whether the delay was "normal."

The test devised by the court below was made out of whole cloth. There is no authority whatsoever for this new "exception" to the categorical rule of *Lucas*. Moreover, if consideration of the governmental interest sought to be advanced is irrelevant to the takings inquiry where all use had been denied, as *Lucas* teaches, there is no rational reason to consider these interests in the determination of whether a delay was "normal" and therefore not a taking. In fact, as noted above, the exception created by the court below would allow government agencies to escape temporary takings liability in all but those rare cases where the agency explicitly espouses its intent to deny all use. An exception that swallows the rule is no exception.

Finally, the "substantial advancement" test is inappropriate and unworkable in this context because it will require courts to inquire into the agency's "good faith" in rendering an illegal decision.[15/] Although the standard of review for determining

---

[15/] For example, the court below concluded that the Commission rendered its erroneous decision in "good faith" because "Landgate has not demonstrated that the development delay between February 1991 and February 1993 was due to anything other than a bona fide dispute over the legality of Landgate's lot. Such delay is an incident of property

(continued...)

whether a dispute is "bona fide" is ostensibly an "objective" one, in practice this standard will be nearly impossible to apply, and will undoubtedly be rebuffed as improper inquiries into the subjective motivations of governmental officials.

Even if it is assumed, *arguendo*, that the substantial advancement test applies under these circumstances, it was not satisfied in this case. To conclude that the Commission's illegal, improper, and erroneous decision to deny Landgate's application for a development permit "substantially advanced a legitimate governmental interest" is contrary to both logic and common sense. What legitimate interest is served by subjecting a property owner to the Hobson's choice of either acquiescing in the agency's illegal "assertion of jurisdiction" or foregoing all beneficial use of the property? In an analogous context, this Court has already concluded that such illegal "pre-conditions" do not substantially advance any legitimate governmental purpose and are therefore unconstitutional. *See Nollan, supra,* 483 U.S. at 839 ("We therefore find that the Commission's imposition of the permit condition [requiring dedication of an easement across plaintiff's lot] cannot be treated as an exercise of its land-use power...").

[15/](...continued)
ownership and not a taking of property." App. 34a. On the other hand, the court below offered the following example of a "bad faith" dispute: "[A] government agency may not evade the takings clause by fabricating a dispute over the legality of a lot, or by otherwise arbitrarily imposing conditions on development in order to delay or discourage that development." App. 31a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN M. REZNIK
Counsel of Record

JOHN M. BOWMAN
JEFFER, MANGELS, BUTLER
& MARMARO LLP
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067
(310) 203-8080
Counsel for Petitioner

Dated: July 28, 1998